No. 80874 - 1

SUPREME COURT OF THE STATE OF WASHINGTON

KATHIE COSTANICH,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

BRIEF OF *AMICI CURIAE* NORTHWEST JUSTICE PROJECT AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON NORTHWEST WOMEN'S LAW CENTER

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I. ISSUE OF CONCERN TO AMICI CURIAE

Washington's Equal Access to Justice Act, RCW 4.84.340-360, grants up to $25,000 in fees and expenses to a qualified party that prevails in a judicial review of administrative agency actions, subject to certain conditions and limitations. Does the phrase "a judicial review" mean (and hence the cap on awards apply to) all possible levels of judicial appellate review collectively or each separate review in a superior or appellate court?

II. IDENTITY AND INTEREST OF AMICI CURIAE

The Northwest Justice Project is a not-for-profit statewide organization that provides free civil legal services to low-income people. The organization operates out of seventeen locations throughout the state of Washington and each year assists more than 18,000 people in need of critical legal assistance. Promoting equal access to justice is a core component of its mission.

The Northwest Women's Law Center is a non-profit public interest organization dedicated to protecting the rights of women through litigation, education, legislation and the provision of legal information and referral services. Since its founding in 1978, the Law Center has

participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country, and is currently involved in numerous legislative and litigation efforts. The Law Center has worked in all areas of the law pertaining to women's rights, including advocating for laws and policies that ensure that women have access to the legal justice system.

The American Civil Liberties Union of Washington is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties. It has a strong interest in promoting equal access to justice and ensuring that litigants can obtain assistance from the private bar when an individual-rights dispute against a government agency arises, particularly when the government position is substantially unjustified. In several cases, such as *ACLU v. Blaine School District No. 503*, 95 Wn. App. 106, 975 P.2d 536 (1999), and *Ermine v. City of Spokane*, 143 Wn.2d 636, 23 P.3d 492 (2001), it has participated as a party and as amicus curiae seeking to uphold fee statutes similar to the one at issue here.

The fee provisions at issue in the case directly implicate the ability of low and moderate income individuals to fairly resolve judicial disputes

with government agencies. *Amici* are keenly interested in a resolution of this case that promotes fair and equal access to the justice system.

III. STATEMENT OF THE CASE

The facts of this case up to the time of the Court of Appeals' decision are fully detailed in that court's opinion. *See Costanich v. Dep't of Social & Health Servs.*, 138 Wn.App. 547, 551-554, 156 P.3d 232 (2007). *Amici curiae* adopts the parties' description of the relevant facts since that time.

IV. ARGUMENT

1. The Plain Language of the Equal Access to Justice Act Allows Each Court Reviewing Agency Actions to Award a Prevailing Qualified Party Up to $25,000 in Fees and Expenses.

Washington's Equal Access to Justice Act provides that "a court shall award a qualified party that prevails in a judicial review of agency actions fees and other expenses ..." subject to certain conditions and limitations. RCW 4.84.340-360. Among the limitations is a $25,000 cap on an award to a party that prevails in "a judicial review". RCW 4.84.350.

The key issue in this case is the scope of 'a judicial review' for which awards are available under the Act. The Department of Social and Health Services argues that 'a judicial review' for purposes of the EAJA

encompasses all levels of court review collectively. Supplemental Br. of Resp't 1 ¶1. Ms. Costanich maintains that it means each separate review carried out by a superior court, Court of Appeals or the Supreme Court. Supplemental Br. of Pet'r 14 ¶2.

This is a question of statutory interpretation which the court reviews *de novo*. *Woods v. Kittitas County,* 162 Wn.2d 597, 607, 174 P.3d 25 (2007). "A reviewing court's primary goal is to determine and give effect to the legislature's intent and purpose in creating the statute." *Id.* The court does so by first relying upon the statute's plain meaning. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002). Plain meaning, this Court has clarified, is derived from what the Legislature has said in the statute and in related statutes which disclose legislative intent about the provision in question. *Id.*

The EAJA defines 'judicial review' through reference to the Administrative Procedures Act; "[j]udicial review means a judicial review as defined by chapter 34.05 RCW". RCW 4.84.340(4). RCW 34.05, however, "does not explicitly define 'judicial review'". *Cobra Roofing Servs. v. Dep't of Labor & Indus.*, 157 Wn.2d 90, 99, 135 P.3d 913 (2006). In the one occasion this Court has had to interpret this provision, it found that administrative reviews or court reviews of agency action

done outside of APA procedures are not judicial reviews for purposes of awards under the EAJA. *Cobra Roofing Servs.*, 157 Wn.2d at 98-101.

In reaching that decision this Court noted with approval the Court of Appeals' conclusion that "a person reading the 'judicial review' section of the APA would necessarily conclude that judicial review means review by **a** superior court, the Court of Appeals, **or** the Supreme Court." *Id.* at 99-100 (citing *Cobra Roofing Serv. v. Dep't of Labor & Indus.*, 122 Wn.App. 402, 418, 97 P.3d 17 (2004) (emphasis added)).

This observation effectively settles the issue in this case. Delving further into the reasons behind it is, however, in order. The Court's conclusion – that 'judicial review' for purposes of the APA, and hence for EAJA fee awards, occurs separately in a superior court, the Court of Appeals and the Supreme Court – derives first from the language of the statutes themselves.

This Court will use dictionaries to ascertain the common meaning of statutory language. *State v. Athan*, 160 Wn.2d 354, 369, 158 P.3d 27 (2007). Black's Law Dictionary defines judicial review as: "A court's review of a lower court's or an administrative body's factual or legal findings". BLACK'S LAW DICTIONARY 852 (7th ed. 1999).

Under this definition, superior courts, the Court of Appeals and the Supreme Court each conduct a single, complete judicial review when they decide an appeal of agency action under APA procedures. Under the APA, each level of court separately reviews the findings of the administrative body. Each enters a disposition. Each concludes its review with an entry of judgment, at least until one of the parties initiates another round of review in a higher court.

The language of the EAJA follows this common sense understanding. With emphasis added, RCW 4.84.350(1) states "**a** court shall award a qualified party that prevails in **a** judicial review of an agency action fees and other expenses ...". The APA also uses the indefinite article "a" to precede "judicial review". *See* RCW 34.05.010. The use of the indefinite article "a" in these statutes is key to their interpretation.

This Court has considered how use of the indefinite article 'a' affects interpretation of a statute in a recent case, *State v. Ose*. 156 Wn.2d 140, 124 P.3d 635 (2005). *Ose* concerned the definition of the unit of prosecution for the crime of possessing a stolen access device. In its decision, this Court noted:

> the legislature unambiguously defined the unit of prosecution in RCW 9A.56.160(1)(c) as one count per access device by using the indefinite article "a" in the clause "a stolen access device." Webster's provides the

> following definition for "a": 1-used as a function word before most singular nouns other than proper and mass nouns when the individual in question is undetermined, unidentified, or unspecified ...; used with a plural noun only if *few, very few, good many,* or *great many* is interposed.

Id. at 146 (2005) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1 (2002) (emphasis in original).

Similarly, the Legislature's use of "a" in RCW 4.84.350 is a deliberate effort to define judicial review as a complete process in which a single level of court reviews the findings and conclusions of administrative agencies or lower courts. The clause 'a court shall award a qualified party that prevails in a judicial review' indicates that awards are to be made, and capped, for each judicial review separately.

The interpretation of RCW 4.84.350 urged by the Department would ignore the use of the 'a' within the statute. Defining 'judicial review' to encompass all levels of court review collectively requires reading RCW 4.84.350(1) this way: 'a court shall award a qualified party that prevails in __ judicial review of agency action fees and other expenses ...'. If 'judicial review' were intended to mean the entire court-based appellate process, the Legislature would not have included the "a" in the statute. Statutes, though, "must be interpreted and construed so that

all the language used is given effect, with no portion rendered meaningless or superfluous." *Cobra Roofing Servs.*, 157 Wn.2d at 99.

Other language in the EAJA also supports the conclusion that the Legislature intended each level of court to make separate assessments and awards, subject to the cap, under the Act. Under RCW 4.84.340(3), the determination of fees and expenses is to be made by "the court" – a description and procedure that makes less sense if the award and cap are understood to apply to all levels collectively. Similarly, under RCW 4.84.360, fees and expenses are deemed payable on the date the court announces them and must be paid within sixty days of the announcement. In effect, each separate court determines whether an award should be made and if so the amount – another indication that 'a judicial review' is likewise carried out separately by each court that hears a case.

2. The Legislature Intended the Equal Access to Justice Act to Ensure that Qualified Parties Could Vindicate Their Rights in Judicial Reviews of Administrative Agency Action.

The Legislature enacted the EAJA to provide procedural protections to low net-worth individuals and organizations involved in judicial disputes with state agencies. Applying principles of statutory construction to the EAJA shows that the Legislature intended that each reviewing court make an award to a prevailing qualified party subject to

the statutory cap. A full review of the legislative history sheds no additional light on this conclusion.

These interpretative tools are only to be applied if the Court finds that the statute in question is ambiguous. *Am. Cont'l Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004). As with all methods of statutory interpretation, the purpose of these inquiries is to ascertain and further the intent of the Legislature. *Campbell & Gwinn*, 146 Wn.2d at 11.

The Legislature stated its reasons for passing the EAJA directly. When it adopted the Act in 1995, it included the following statement:

> The legislature finds that certain individuals, smaller partnerships, smaller corporations, and other organizations may be deterred from seeking review of or defending against an unreasonable agency action because of the expense involved in securing the vindication of their rights in administrative proceedings. The legislature further finds that because of the greater resources and expertise of the state of Washington, individuals, smaller partnerships, smaller corporations, and other organizations are often deterred from seeking review of or defending against state agency actions because of the costs for attorneys, expert witnesses, and other costs. The legislature therefore adopts this equal access to justice act to ensure that these parties have a greater opportunity to defend themselves from inappropriate state agency actions and to protect their rights.

Laws of 1995, ch. 403, § 901. The Legislature explicitly found that individuals and organizations were often deterred from seeking review of, or defending against, unreasonable agency action. And they were deterred

because of the high costs of litigation and the greater resources and expertise of the state. It created the fee-shifting mechanism in the EAJA to address this problem – "to ensure that these parties have a greater opportunity to defend themselves from inappropriate state agency actions and to protect their rights". Laws of 1995, ch. 403, § 901.

The EAJA would fully serve these purposes only if it allowed each reviewing court to award fees up to the statutory cap. The Act, like other fee-shifting statutes, provides a mechanism to obtain representation in cases that, although meritorious, are unlikely to yield significant financial benefit. For low and moderate income parties, there are few, if any, alternative ways to secure representation. Free civil legal services already reach only a small proportion of those who need, and are eligible for, their services. *See* Washington State Supreme Court Taskforce on Civil Legal Equal Justice Funding, The Washington State Civil Legal Needs Study (2003). Otherwise, there is self-representation before the Courts of Appeals – a circumstance hardly conducive to a well-considered decision on the merits.

The Department's interpretation would subvert the EAJA's stated purposes. The Legislature found that low and moderate income parties were deterred from litigating against administrative agencies because of

the high cost of litigation. Further, without the possibility of fees agencies would have a greater incentive to appeal cases regardless of the merit of their position as they would effectively be able to use their superior resources and expertise to defeat opposing parties who lack sufficient resources.

The Court's decision in this case also addresses a distinct subset of cases that particularly exemplify the concerns that motivated the Act. At issue here are those cases in which a superior court finds the actions of an administrative agency were not "substantially justified" as is required by the Act, RCW 4.84.350; and the agency appeals that ruling; and then the Court of Appeals affirms while likewise concluding that the agency's action was not "substantially justified" in its position. In effect, awards above $25,000 can only be made when an administrative agency uses its superior resources to prolong litigation into the appellate courts and each court finds the agency actions unreasonable – a situation which the EAJA was designed to prevent.

As its title proclaims, the Equal Access to Justice Act was passed to increase access to the court system. Doing so renders an interpretation that allows each reviewing court to make a separate award up to the statutory cap.

A. The Equal Access to Justice Act is a Remedial Statute that Should Be Liberally Construed

The EAJA is a remedial statute that should be liberally construed to allow qualified parties to defend against unreasonable agency action through sometimes extended judicial review. A remedial statute should be construed liberally, so as to effectuate its purpose. *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 34, 42 P.3d 1265 (2002). Remedial statutes "afford a remedy, or better or forward remedies already existing for the enforcement of rights and the redress of injuries." *Haddenham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976). They relate to practice, procedure, and remedies, as opposed to vested or substantive rights. *Miebach v. Colasurdo*, 102 Wn.2d 170, 181, 685 P.2d 1074 (1984). Remedial statutes must be liberally construed in favor of their intended beneficiaries and their exceptions narrowly confined. *Int'l Ass'n of Fire Fighters*, 146 Wn.2d at 34.

The case of *Sebastian v. Department of Labor & Industries*, 142 Wn.2d 280, 12 P.3d 594 (2000), provides a relevant example of these principles at work. In *Sebastian*, an assault victim sought compensation for injuries under the Crime Victims Compensation Act, RCW 7.68.010 *et seq*. The Act allowed for awards up to $30,000 per injury. But it also stated that the "benefits payable" under the Act's provisions would be

"reduced by the amount of any other public or private insurance available." RCW 7.68.130. Sebastian had received $7,788 from the Social Security Administration for time-loss related to his injury. The Department of Labor and Industries argued that this amount should have been deducted after the $30,000 statutory cap was applied. Sebastian maintained that the deduction should have been applied to the damages he suffered before the cap was applied – damages that totaled $43,000. *Sebastian*, 142 Wn.2d at 282-83.

On review, this Court found the statutory phrase 'benefits payable' to be ambiguous. *Id.* at 283-84. Because the Crime Victims Compensation Act was "patently remedial," the Court construed the ambiguous provision in the way that most effectively compensated victims of crime. *Id.* at 284. The Court adopted the interpretation urged by Sebastian, awarding him $30,000 plus fees and costs. *Id.* at 286.

The Legislature intended the EAJA to ensure that individuals and organizations with limited resources would "have a greater opportunity to defend themselves from inappropriate state agency actions and to protect their rights". Laws of 1995, ch. 403, § 901. It does so by allowing courts, under certain circumstances, to award fees and expenses to a prevailing

party. By its goal and chosen mechanism, the EAJA is plainly a remedial statute.

This conclusion comports with the recognition that the federal EAJA[1] is remedial as are other statutory fee-shifting provisions[2].

As such, any ambiguities in the EAJA must be liberally construed in favor of its intended beneficiaries. *Int'l Ass'n of Fire Fighters*, 146 Wn.2d at 34. Low net-worth individuals and organizations seeking, or defending against, judicial review of agency action are the intended beneficiaries of the EAJA. Construing the statute in their favor would allow each reviewing court to make separate awards under the Act up to the $25,000 cap.

B. The Legislative History of the Act is Inconclusive as to the Issue Before this Court

When a reviewing court must interpret an ambiguous statute, it will also look to the legislative history of the law to help ascertain the reading that best effectuates the purpose of the statute. *Campbell & Gwinn,* 146 Wn.2d at 11. The materials related to the Legislature's

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[1] *See e.g. McDonald v. Sec. of Health & Human Servs.*, 884 F.2d 1468, 1481 (1st Cir. 1989); *Iowa Exp. Distribution, Inc. v. NLRB*, 739 F.2d 1305, 1309 (8th Cir. 1984); *Rawlings v. Heckler*, 725 F.2d 1192, 1196 (9th Cir. 1984).

[2] *See e.g., Wachovia SBA Lending v. Kraft*, 138 Wn.App. 854, 862, 158 P.3d 1271 (2007) (interpreting RCW 4.84.330); *Fraser v. Edmonds Cmty. Coll.*, 136 Wn.App. 51, 56, 147 P.3d 631 (2006) (interpreting RCW 49.48.030); *Kauzlarich v. Yarbrough*, 105 Wn.App. 632, 649 n.2, 20 P.3d 946 (2001) (interpreting RCW 4.24.510).

consideration of the EAJA are, however, inconclusive regarding the issue now before the Court. In noting this, it must be mentioned that the Department's strong claim about the legislative history to the contrary, *see* Supplemental Br. of Resp't 12, was made without reference to some of the most relevant documents. Those are discussed in detail below.

The Equal Access to Justice Act was passed in the context of efforts to comprehensively reform Washington's system of administrative regulation and enforcement. What is called the Equal Access to Justice Act ultimately passed as part of a bill that amended 39 statutes and added new sections to 17 more statutes. Laws of 1995, ch. 403. Related bills of similar scope were passed, subject to partial vetos, in 1994 and 1997. *See* Laws of 1994, ch. 249; Laws of 1997, ch. 409.

The Governor summed up his reaction to the politics surrounding these efforts in the message that accompanied his partial veto of the 1995 bill. He noted "[o]ver the last few years, the issue of regulatory reform has generated spirited discussion and debate. I have come to the conclusion that, like beauty, regulatory reform is really in the eye of the beholder. While there is widespread agreement about the problems, there is less clarity regarding solutions." Laws of 1995, ch. 403.

The year after the EAJA was passed, the Legislature returned to the issue of fees and expenses for litigants defending their rights against government action. House Bill 2747 (1996) would have modified the maximum awards under RCW 4.84.350. It also would have clarified how the Act applies at the different levels of court review. The accompanying bill report states why this clarification was deemed necessary: "The law [RCW 4.84.350] does not address the awarding of fees and other expenses if the agency appeals the Superior Court decision." House Bill Report 2427 (1996).

The Legislature again returned to the issue in 1997. *See* Laws of 1997, ch. 409. A comprehensive reform bill would have amended the EAJA in key places related to the issue at hand. RCW 4.84.340 would have been amended so: (4) "Judicial review" means ~~a judicial review as defined by chapter 34.05 RCW~~ review of an agency action in the superior court and courts of appeal. Laws of 1997, ch. 409 § 501. RCW 4.84.350(2) would have been amended so: The amount awarded a qualified party under subsection (1) of this section shall not exceed ~~twenty-five~~ fifty thousand dollars for the fees and other expenses incurred in superior court, and fifty thousand dollars for the fees and other expenses

incurred in each court of appeal to a maximum of seventy-five thousand dollars. Laws of 1997, ch. 409, § 501.

Governor Locke, though, vetoed portions of the bill, including those relevant to fee awards. His veto message explained:

> Sections 501 through 503 make major changes in the Equal Access to Justice Act, which was recently enacted in 1995 under ESHB 1010. The proposed changes expand the program to judicial review of all agency actions, not just APA issues; modify the standard for allowing attorney's fees; substantially increase awards and the net worth of persons who can qualify for awards; and make other changes regarding the payment of fees. I am not convinced that such changes are justified in a program that is less than two years old and has been applied to only a handful of cases. The current law, with its existing limits and standards, was intended to cure the evils the legislature sought to eliminate. For these reasons, I have vetoed sections 501, 502, and 503.

Laws of 1997, ch. 409 at 2559-61.

These materials, and those cited by the Department, are susceptible to a variety of interpretations. It can be fairly argued for instance that the Legislature sought in 1996 and 1997 to clarify its intention that awards under the EAJA are to be made, and capped, at each separate level of judicial review. The 1996 House Report shows a belief that the intent to allow separate fee awards for each level of judicial reviews was not sufficiently clear in RCW 4.84.340 as it is written. The full House and Senate adopted a provision that would have made its intent, and the

procedure, clear. And the Governor's veto message indicated no objection to granting separate fee awards, subject to the cap, at each level of review. Still, while consistent with cited materials, this is conjecture.

Such an exercise makes clear though that in light of all the available legislative materials, it is a distinct overstatement to claim that the legislative history shows "a purposeful decision to limit agency liability for attorneys' fees to twenty-five thousand dollars per case". Supplemental Brief of Resp't 12. The weight of the Department's argument comes from speculating as to the reasons why particular amendments and laws did not pass the Legislature. *See* Supplemental Br. Of Resp't 10-13.

But this Court has made clear that "legislative intent cannot be gleaned from the failure to enact a measure" and "a reviewing court will not speculate on the legislature's reasons for rejecting a proposed amendment." *City of Medina v. Primm*, 160 Wn.2d 268, 157 P.3d 379 (2007) (citing *State v. Conte*, 159 Wn.2d 797, 813, 154 P.3d 194 (2007) and *Spokane County Health Dist. v. Brockett*, 120 Wn.2d 140, 153, 839 P.2d 324 (1992)). A thorough review of all the relevant materials simply does not support the Department's position, especially in light of the Legislature's express statement of its intent in the EAJA itself.

V. CONCLUSION

The Legislature passed the Equal Access to Justice Act so that individuals and organizations with limited resources would "have a greater opportunity to defend themselves from inappropriate state agency actions and to protect their rights". The plain language of the Act carries out this intent by allowing each separate court that finds administrative agency action unreasonable upon review to award fees and expenses to the prevailing party, subject to the statutory cap. Applying principles of statutory construction to the Act only strengthens this conclusion.

Accordingly, *amici* request that the Court reverse the ruling of the Court of Appeals and remand with instructions to the Court of Appeals to enter an award of fees and expenses up to the statutory cap.

RESPECTFULLY SUBMITTED, April 11th, 2008.

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